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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 509

PARMELEE TRANSPORTATION COMPANY,
A CORPORATION,
Petitioner,

vs.

ZOE GRIVAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Court of Appeals for the Seventh Circuit, deciding adversely to petitioner important questions as to the application of the Federal Rules of Civil Procedure with respect to voluntary dismissals by plaintiffs of actions removed from State to Federal courts, has set aside a judgment of the District Court for the Northern District of Illinois, Eastern Division, refusing the dismissal without prejudice of her suit removed to that court from the Circuit Court of Cook County, Illinois, and has remanded the cause to the district court for the exercise of an informed discretion in passing upon respondent's motion to dismiss. But it affirmatively appears that the district court exercised such a discretion and the Court of Appeals

does not find, nor does it intimate, that the discretion has been abused.

In so reversing, it expressly overruled its holding in *Bolton* v. *General Motors Corporation,* 180 F. (2) 379, that the plaintiff had an absolute right to dismiss her suit without prejudice at any time before trial and expressly yielded to decisions directly to the contrary in other circuits and text commentary cited in the opinion.

Thus this decision had its genesis in a direct conflict of authority between its own earlier decision in the *Bolton* case and the exactly contrary decisions of sister courts. While this conflict was resolved (adversely to petitioner) by the instant decision, that resolution raised the substantial questions hereafter set forth.

A Sufficient Summary of the Facts to Delineate the Questions Presented.

Respondent (plaintiff) filed an action in the Circuit Court of Cook County, Illinois, to recover for personal injuries allegedly sustained as the result of the negligent operation of petitioner's automobile, which, so it was averred, collided with an automobile in which respondent was a passenger. (R. 6-9.) Respondent being a natural citizen of Illinois, petitioner being a Delaware corporation and the *ad damnum* being $25,000, petitioner "appropriately removed this cause to the United States District Court for the Northern District, Eastern Division." (Opinion, R. 93.) During the course of the proceeding, plaintiff's counsel learned, so it was represented to the District Court, that in another proceeding in the State Court growing out of the same accident, it was shown or indicated that Coula Papadatos (the driver of the car in which plaintiff was a passenger) had failed to obey a red light and was or might have been responsible for the collision. Shortly thereafter, on February 6, 1953, counsel for the

plaintiff sought leave to make Coula Papadatos, a resident of Illinois, an additional party-defendant. This leave was denied on objection of defendant on the ground that to do so would destroy Federal jurisdiction.

> "Thereupon, plaintiff, on February 10, 1953, moved to dismiss the cause without prejudice, which motion, on defendant's objection, was denied and the case set for trial on the following day. On the day the motion to dismiss was denied, plaintiff filed notice of appeal from the order of refusal, together with the required cost bond. When the case was called for trial on February 11, 1953, it was argued to the court that it had lost jurisdiction because of this appeal. The court held that the appeal was not from a final order and that it had jurisdiction to proceed. Thereupon, plaintiff's counsel refused to participate in the trial. Notwithstanding, a jury was empaneled and, at the direction of the court, returned a verdict in favor of the defendant, upon which judgment was entered. On February 12, 1953, plaintiff filed another notice of appeal, entitled 'Amended and Supplemental Notice of Appeal,' from the judgment thus entered." (*Opinion*, R. 93-4.)

The Decision of the Court of Appeals.

Although neither party challenged the correctness of the holding of the Court of Appeals for the Seventh Circuit in the *Bolton* case, that Court *sui sponte* overruled and retracted its holding in that case in the following language:

> "We do not renounce the possibility that there might be an instance where this court could be right and all others wrong, but the *Bolten* decision does not, in our judgment, come within that category. Some of the courts, since the *Bolten* case, have directly

taken issue with it while others, without mentioning it, have held what we now conclude is the correct interpretation of the rule. We cite without further comment cases and authorities which have held contrary to our decision in *Bolten. New York, C. & St. L. R. Co.* v. *Vardaman,* 181 F. 2d 769, 770; *Larsen* v. *Switzer,* 183 F. 2d 850, 851; *Ockert* v. *Union Barge Line Corp.,* 190 F. 2d 303, 304; *Westinghouse Electric Corp.* v. *United Electrical Radio and Machine Workers of America et al.,* 194 F. 2d 770, 771; *Moore et al.* v. *C. R. Anthony Co.,* 198 F. 2d 607, 608; *Barnett* v. *Terminal R. Ass'n of St. Louis,* 200 F. 2d 893, 894. See also *Cone* v. *West Virginia Pulp and Paper Co.,* 330 U. S. 212, 217; Barron and Holtzoff, Federal Practice and Procedure (1952 pocket part), Vol. 2, Sec. 912, and Moore's Treatise on Federal Practice, Vol. 5, page 109, footnote 5." (R. 95-6.)

In reversing the district court's judgment on the merits, thus rendered after the plaintiff had refused to participate in the trial because she claimed an absolute right to the allowance of her motion in the nature of a voluntary non-suit, the Court of Appeals made the following serious misstatement of fact:

> "We come now to the vital question that is, whether the District Court abused the sound judicial discretion which it was called upon to exercise in ruling upon plaintiff's motion to dismiss. The only reason disclosed in the record for the ruling is a statement made by the court, as follows: '* * * the Court feels that the case having been set for trial already then on the trial call, and the defendant having acquired a right to be tried in the federal court, that had such a motion been granted, it would have deprived the defendant of that right.' " (R. 96.)

The Court of Appeals' statement that "the only reason disclosed in the record for the ruling" [denying the motion of dismissal] was the court's statement that "had such a motion" [to dismiss without prejudice] "been

granted it would have deprived the defendant of that right'' to be tried in the federal court, is directly contrary to the record.

The following are statements of the judge preserved in the printed script of the record (Tr. 46):

> ''The case has been on the calendar for trial and we have spent a great deal of time in pretrial conference in this case, and I have ordered you to conform to all the requests of the plaintiff to produce all the documents required, and against your desire I have kept this on the calendar and I have insisted that it be tried, *and I see no reason why it should not be tried.*''

The trial court said (Tr. 29):

> ''The Court: Well, having spent as much time as we have on this matter, I would say that it would seem to me that the motion to dismiss, after this case has been set down for trial, comes at a rather late time.''

Hence the trial judge made it very clear that if he had a right to deny the motion for dismissal without prejudice, he was disposed to exercise that right. Nowhere did the trial court deem himself without jurisdiction to *permit* dismissal without prejudice. His quandary was whether he *had* to permit such dismissal, not as to whether he had a right to prevent it; for he made it clear that he knew that he could permit dismissal, that he was in doubt as to whether he must permit it, and that if he could but need not permit it, he was disposed to deny the motion. Thereupon he denied the motion to dismiss.

That the court's views were addressed to the equities and merits of respondent's request appears from the following excerpts from his remarks (Tr. 27):

> ''Well, this case has been pending a good many months.''

Of course this case was briefed and argued in the Court of Appeals for the Seventh Circuit in the light of that Court's holding in the *Bolton* case that the right to dismiss was absolute. Defendant contended that the right was not absolute in a removal case.

In concluding its opinion, the Court of Appeals made the following statements:

> "We need not hold that the court abused its discretion in refusing plaintiff's motion to dismiss. It is more apt to conclude, and we do, that the court for the reason shown denied the motion upon an asserted legal premise which in fact does not exist. Plaintiff urges that this court fix the terms and conditions upon which a dismissal be allowed. This we shall not do because, whether the dismissal should be allowed and, if so, the terms and conditions to be imposed, are matters within the sound judicial discretion of the District Court. * * *
>
> "The cause is reversed and remanded, with directions that the judgment be vacated and that the court proceed in conformity with the views herein expressed." (R. 99.)

As we have shown, the opinion for the Court of Appeals sets at naught the district court's clear declaration that in that court's judgment, the plaintiff should not be permitted to dismiss her suit but the Court of Appeals does not find that that exercise of discretion was abused.

The Court of Appeals also holds that, notwithstanding the provisions of Section 1446 (e) of the Judicial Code that after removal, "The State court shall proceed no further unless and until the case is remanded," the respondent was subject to a new suit in the State court, identical to the instant case in all respects material to the petitioner's liability.

In short, the Court of Appeals has held that although the State court would have no further jurisdiction in this removal cause, the district court may take from petitioner its rights acquired by removal by authorizing a respondent to bring a similar new suit against petitioner in the State court.

Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment in Question.

This Court has jurisdiction to review the judgment in question under section 1254 of the Judicial Code (Title 28, U. S. C. A. sec. 1254).

Judgment was entered in this case on February 11, 1953 (R. 54), rehearing was denied on November 24, 1953.

The Questions Here Presented.

The questions presented are:

1. DID THE COURT OF APPEALS INVADE AND USURP THE DISCRETIONARY POWERS OF THE DISTRICT COURT BY REVERSING THAT COURT'S REFUSAL OF DISMISSAL WITHOUT PREJUDICE WHEN IT APPEARED FROM THE RECORD THAT SUCH REFUSAL WAS BASED UPON THE DISTRICT COURT'S EXERCISE OF DISCRETION AND THE COURT OF APPEALS DID NOT FIND THAT OR CONSIDER WHETHER THE DISTRICT COURT'S JUDICIAL DISCRETION HAD BEEN ABUSED?

2. WHERE A CAUSE HAS BEEN REMOVED TO THE DISTRICT COURT, MAY A UNITED STATES COURT PERMIT DISMISSAL WITHOUT PREJUDICE WHEN THE EFFECT OF SUCH DISMISSAL WILL BE TO PERMIT STATE COURTS TO ENTERTAIN THE IDENTICAL CAUSE AGAINST THE SAME DEFENDANT, NOTWITHSTANDING THE PROVISIONS OF SECTION 1446 (e) OF THE JUDICIAL CODE CONTEMPLATING NO FURTHER PROCEEDINGS IN STATE COURTS AFTER APPROPRIATE REMOVAL?

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

Petitioner is mindful that this Court does not sit to review every error, even though the error be a serious one and decisive of the rights of particular parties, that may occur in lower courts.

Petitioner is mindful that in order to evoke this Court's writ of certiorari, the case must either present substantial questions of general importance or must be one in which the Court of Appeals "has so far departed from the accepted and judicial course of proceeding * * * as to call for this Court's exercise of power of supervision."

But petitioner submits that this case is of sufficient moment to elicit *certiorari* for the following reasons:

At the time that this case was argued at the bar of the Seventh Circuit, there was a direct, irreconcilable and admitted conflict between that Court's holding in the *Bolton* case and the decisions in other circuits cited in the opinions of the Court of Appeals as to whether the plaintiff's right to dismiss without prejudice or to take a voluntary non-suit before trial was absolute, as the Court of Appeals for the Seventh Circuit had held in the *Bolton* case, or was within the discretion of the trial court, as was held in other circuits passing upon the question.

Having decided to overrule the *Bolton* case, the Court of Appeals declared that the district court had not deemed itself vested with an informed discretion when that court had expressly declared that if it had such discretion, it would exercise it in dismissal of the motion to dismiss and had in fact denied the motion.

Of more general importance, however, is the fact that

the presently standing opinion of the Court of Appeals for the Seventh Circuit permits, without precedent in this Court, either sanctioning or inhibiting such permission, a plaintiff to take a non-suit in a *removed* case for the express purpose of suing the same defendant upon the same cause of action in a State court, notwithstanding the explicit prohibition of Section 1446 (e) of the Judicial Code that after removal a State court shall proceed no further with the cause that has been removed.

Of importance, too, is the question whether the Court of Appeals, in reversing the District Court without finding error in that court's adjudication, exercised original and not appellate jurisdiction.

Prayer for the Writ of Certiorari.

Wherefore, petitioner prays this Court's writ of *certiorari* to review and reject the decision of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Respondent.

BRIEF IN SUPPORT OF THE PETITION.

The opinion of the Court of Appeals is reported in 207 F. (2d) at page 334 and will be found in the record at pages 93 to 99.

Reference to Petition for Statement of the Facts and of the Questions Presented.

The facts are stated and the question sought to be presented is delineated in the Petition for *Certiorari*. Therefore reference to that petition for Statement of the Facts and of the question presented is respectfully made.

SUMMARY OF ARGUMENT.

This cause was argued in the Court of Appeals in the light of a conflict of authority between that Court's decision and *Bolton* v. *General Motors Corporation*, 180 F. (2d) 379, and the decisions from other circuits cited in the opinion.

In this case the Court of Appeals took occasion to overrule *sui sponte* its decision in the *Bolton* case and to accede to the contrary holdings of other circuits. But the district court had decided this case *not in accordance with the pertinent case, but in accordance with decisions in other cases.*

The Court of Appeals reversed the district court, declaring that that court had not deemed itself vested with discretion in the matter. The record shows, however, that the district court had deemed itself vested with discretion and that it exercised that discretion in a way with which the Court of Appeals found no fault.

In reversing the district court without finding that or considering whether it had abused its discretion, the Court of Appeals exercised original and not appellate jurisdiction.

These considerations are submitted as sufficient to elicit *certiorari* and to evoke reversal.

ARGUMENT.

I.

The Opinion of the Court of Appeals Has Denied the Instant Plaintiff and Has Set a Precedent for Denying Other Plaintiffs Substantial Rights Under the Removal Provisions of the Federal Judicial Code When Those Rights Have Been Recognized and Enforced by the District Court. This the Court of Appeals Has Done Without Finding That or Considering Whether the District Court Has Abused Its Discretion.

In *Harvey Aluminum Inc.* v. *American Cyanamid Co.*, 203 F. (2d) 105, the Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, said at page 107:

> "The purpose of this rule"—[Rule 41a]—"is to facilitate voluntary dismissals, but to limit them to an early stage of the proceedings before issue is joined."

In *Palmer* v. *Delaware, L. & W. R. Co.*, 222 Fed. 461, after having been served with notice of defendant's intention to remove, the plaintiff moved for and obtained, at the time the removal papers were filed, a discontinuance of the action, and immediately brought another suit similar to the first, except that it claimed a sum under the jurisdictional amount required for removal. The federal court enjoined the plaintiff from taking further proceedings in the state courts. The plaintiff moved in the federal court for a discontinuance. The motion was denied unless the plaintiff would stipulate to discontinue the second action and not again bring action against the defendant in any court on this cause of action. The court said at page 465:

"The constitutional right of Congress to provide for the removal of causes from the state to the federal courts is settled (*Tennessee* v. *Davis*, 100 U. S. 257, 265, 25 L. Ed. 648, 651); and 'the Legislature or the judiciary of a state can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the state into the Circuit (now District) Court of the United States, *nor limit the effect of such removal*' (*Goldey* v. *Morning News*, 156 U. S. 518, 523, 15 Sup. Ct. 559, 39 L. Ed. 517, 519; *Madison Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462). And the state court cannot do that indirectly which it cannot do and is forbidden to do directly. While the state court itself may not be enjoined from proceeding in the state court on the same cause of action, the parties to the action may be. *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239, 245, 25 Sup. Ct. 251, 49 L. Ed. 462. In this case the Supreme Court of the United States held:

> "'After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature—without violating section 720, Rev. St., forbidding a court of the United States from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court.'"

Also, in *Home Owners' Loan Corporation* v. *Huffman*, 8 Cir., 134 F. (2d) 314, the Court of Appeals said at page 318:

> "If it were demonstrated that the defendant would lose the advantage which it now has by a change of forum that might be reason for holding that the court abused its discretion by permitting a dismissal without prejudice even had terms been imposed. In speaking of the result of a dismissal without prejudice by a plaintiff for the purpose of bringing a suit in another Court, Judge Learned Hand in *Young* v. *South-*

ern Pac. Co., 2 Cir., 25 F. (2d) 630, 632, said "* * * One court is as good as another. But the situation changes when there is substantial doubt whether the courts will not apply different rules, and when the plaintiff's purpose is so to maneuver the litigation that the defendant will lose his existing advantage. The loss of the federal forum then becomes a grave prejudice, quite as much as, and indeed more than, the expense and delay in trying the suit up to decree, or even the failure of a cross-bill.' "

Also at page 318:

"Under rule 41a plaintiff does not have an absolute right to dismiss his case without prejudice after an answer has been served."

The provisions of Section 1446 (e) of the Judicial Code (U. S. C. A., Title 28, Sec. 1446 (e)) are in full as follows:

"Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, **which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.**"

But the avowed purpose of the plaintiff in the instant case was to frustrate the defendant's right of removal in all virtual effect because the plaintiff assured the trial court, not merely incidentally but as a ground for asserting her alleged absolute right to dismiss without prejudice, that she intended to sue the *same* defendant upon the *same* cause of action in a State court and to join a defendant who was a resident of Illinois, which joinder would prevent petitioner from removing such renewed cause to the federal courts.

Thus the district court perceived, respected and preserved petitioner's rights, declared by the Court of Appeals for the Second Circuit, to be "substantial" in *Home Owners Loan Corporation* v. *Huffman*, cited above, 134 F.

(2d) 314, but the Court of Appeals has annulled that preservation of this substantial right without finding that error had intervened in the district court's judgment. Under Point II, immediately *infra*, we demonstrate that in so doing, the Court of Appeals in effect exercised original, not appellate, jurisdiction.

II.

In Reversing the District Court Without Finding That Error Had Intervened in That Court's Judgment, the Court of Appeals Exercised Original, Not Appellate, Jurisdiction. This Exercise of Original Jurisdiction Should Elicit Certiorari.

The jurisdiction of courts of appeals (except in statutory instances not pertinent here, such as occur when that court exercises *nisi prius* jurisdiction upon direct review of orders of the tax court and other administrative tribunals), is appellate and not original.

As recently as *Bankers Life and Casualty Co.* v. *Holland*, 74 S. Ct. 145, decided November 30, 1953, this Court had occasion to recognize that Congress had restricted the functions of Courts of Appeals to appellate, not original.

In this case the district court has declared that in its view it was not in the interests of justice to permit the respondent's unconditional dismissal without prejudice of her action against petitioner. *The Court of Appeals does not reach a contrary conclusion!*

Nevertheless the Court of Appeals has vacated the district court's order and has remanded this cause to that court.

In so doing, it has exerted and, we respectfully say, has usurped the original *nisi prius* jurisdiction which Con-

gress has confided exclusively to the district court in cases of this kind.

We are compelled to submit that the judgment of the Court of Appeals was arbitrary and transcended its appellate jurisdiction.

Conclusion.

For reasons apparent upon the record, suggested in the petition, and urged in this brief, it is respectfully submitted that this Court should grant its writ of *certiorari* to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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Argument:

The only issue determined by the decision of the Court of Appeals for the Seventh Circuit, was that the District Court erred in deciding that the defendant (petitioner herein) had an absolute right to a trial in the District Court in a removed case, where the plaintiff (respondent herein) in good faith and for valid reasons moved for a dismissal under Rule 41 (a) (2) of the Federal Rules of Civil Procedure 7

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals is officially reported in 207 F. (2d) at page 334, and will be found in the record at pages 93 to 99, both inclusive.

To refute the subject matter of petitioner's brief concerning this Court's jurisdiction to review the judgment in question and its argument, the court's attention is respectfully called to pertinent parts of the opinion of the Court of Appeals as follows:

"The essential question now before us is whether the District Court erred in its refusal to allow plaintiff's motion to dismiss." (R. 94)

"It is never a pleasant task for a court of review to overrule a previous decision upon which litigants and the District Courts of the Circuit have a right to rely, but we have reached the conclusion that our interpretation as announced in the *Bolton* case was too broad and that this is the time to modify it. The unanimous view of other courts and textbook writers is that the allowance of a motion to dismiss under Rule 41 (a) (2) is not a matter of absolute right—that it is discretionary with the court 'upon such terms and conditions as the court deems proper.'" (R. 95)

"We come now to the vital question, that is, whether the District Court abused the sound judicial discretion which it was called upon to exercise in ruling upon plaintiff's motion to dismiss. The only reason disclosed in the record for the ruling is a statement made by the court, as follows: '* * the Court feels that the case having been set for trial and already then on the trial call, and the defendant having acquired a right to be tried in the federal court, that had such a motion been granted it would have deprived the defendant of that right.' It is apparent that the court adopted defendant's view, erroneously we think, that because this was a removed action it had an absolute right to a trial in the District Court. In its written objections to the motion to dismiss, defendant stated: 'The plaintiff intends * * if such motion should be allowed, to file a suit in a State court of Illinois against this plaintiff and Coula Papadatos, for the purpose of depriving this defendant of the right to try this case in the District Court of the United States, which it has exercised by removal of this cause from the Circuit Court of Cook County, Illinois.'" (R. 96)

"True, defendant was granted by Congress the right to remove the case from the State to the Federal Court but, when it arrived there, it was subject to the same rule of procedure as if it had been originally sued in that court. Rule 81 (c) provides: 'These

rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.'" (R. 97)

"As a corollary to the contention that defendant has an absolute right to a trial in a removed case is the argument that to deprive him of that right amounts to legal prejudice. It has been held, however, that a litigant does not have a vested right in any given mode of procedure. *Ex Parte Collett*, 337 U. S. 55, 71; *New York, C. & St. L. R. Co.* v. *Vardaman*, 181 F. 2d 769, 771."

"That the defendant will be subjected to a second suit is no bar to an order of dismissal without prejudice. (Citing cases.) The substantive rights of the parties in the case at bar are controlled by the law of New Hampshire, and no other rule of law can be invoked. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.'" (R. 97, 98)

"Neither is there any merit in the argument that plaintiff attempted to make Coula Papadatos a party-defendant for the purpose of destroying jurisdiction although, if permitted, that might have been the effect, and that having been frustrated in that attempt, sought a dismissal in order to accomplish the same purpose. We find nothing in this record which indicates that plaintiff's attorney was acting other than in good faith. When he discovered that the alleged injuries of plaintiff might have been caused either by the negligence of Coula Papadatos or that of defendant as was originally alleged, or by their joint negligence, we see nothing improper about counsel's desire to try the issues against them in one law suit rather than two. The trial of separate cases against the two defendants would afford each an opportunity to lay the blame on the other, and each might succeed. If both defendants are tried in the same case, a court or jury will be in a better position to decide where the actual blame, if any, resides." (R. 98)

"We need not hold that the court abused its discretion in refusing plaintiff's motion to dismiss. It

is more apt to conclude, and we do, that the court for the reason shown denied the motion upon an asserted legal premise which in fact does not exist." (R. 99)

STATEMENT OPPOSING JURISDICTION.

The reasons relied upon by petitioner for granting its petition are set forth at page 8 of its petition and do not set forth valid grounds pursuant to Rule 38(5)(b) of this Court.

Petitioner's isolated statement that the decision of the Court of Appeals "has so far departed from the accepted and judicial course of procedure * * * as to call for this Court's exercise of power of supervision" is not supported by the record nor argued in its brief.

The fact that the Court of Appeals modified its holding in the *Bolton* case to conform with the unanimous view of other courts and text book writers is not grounds for the allowance of the petition for a Writ of Certiorari.

We regretfully submit that we cannot comprehend paragraph 5 at page 8 of petitioner's brief, and, accordingly, make no answer thereto.

The fact that a plaintiff desires a non-suit in a removed case and admits he intends to refile in a State court is not grounds in urging this Court to grant a Writ of Certiorari.

Petitioner's last point is without foundation, for the Court of Appeals expresaly predicated its opinion upon its determination that error was committed in the District Court.

INACCURACIES IN PETITIONER'S STATEMENT OF THE CASE.

Petitioner's statement at page 1 of its brief that the Court of Appeals set aside a judgment of the District Court refusing the dismissal of respondent's removed law suit without prejudice is erroneous. After a notice of appeal and bond had been duly filed (R. 41, 42) the District Court empaneled a jury and directed a verdict of not guilty. Judgment therein was entered on the verdict with costs (R. 43, 44), *ex parte*, no testimony having been offered. An appeal (R. 53) was taken from this judgment and it was that judgment that was vacated.

"The cause is reversed and remanded with directions that the judgment be vacated and that the court proceed in conformity with the views herein expressed." (Opinion, R. 99)

The District Court's judgment was not on the merits and the plaintiff refused to participate in the trial because she had filed the statutory notice of appeal and bond, and it was her contention that the District Court had lost jurisdiction. (R. 47)

Petitioner's statement at pages 4 and 5 of its brief that the Court of Appeals' quotation from the record was contrary to the record as to the reason given by the District Court for its ruling, is a shocking misstatement. The direct quotation is as follows:

> "Let the record show further that * * * until within the last week when certain developments have occurred when the court refused to permit the addition of another defendant who was a resident of Illinois, which would have deprived this court of jurisdiction to hear the matter; and further that thereafter the plaintiff's attorney appeared in open court on Febru-

ary 10 and made a motion to dismiss this cause without prejudice, *and this motion was denied by the court for the reason that the court feels that the case having been set for trial, and already on the trial call, and the defendant having acquired a right to be tried in the Federal Court, that had such a motion been granted it would have deprived the defendant of that right.* Consequently the court has denied that motion and directed that the case proceed to trial; *and the court considers the notice of appeal and the bond to be of no importance for the reason that the order entered denying the motion was not an appealable order.*" (R. 50)

QUESTION PRESENTED.

Did the District Court commit error in deciding that the defendant had an absolute right to a trial in the District Court, in a removed action where the plaintiff in good faith and for valid reasons moved for a dismissal under Rule 41 (a) (2) of the Federal Rules of Civil Procedure?

ARGUMENT.

The only issue determined by the Court of Appeals for the Seventh Circuit was whether or not the District Court committed error in deciding that the defendant had an absolute right to a trial in the District Court in a removed action where the plaintiff in good faith and for valid reasons moved for a dismissal under Rule 41 (a) (2) of the Federal Rules of Civil Procedure.

This Court has decided many times, namely, that a litigant does not have a vested right in any given mode of procedure. *Ex parte Collett*, 337 U. S. 55, 71; *New York C. & St. L. R. Company* v. *Vardaman*, 181 F. 2d 769, 771.

Petitioner's statement at page 9 of its brief that the opinion of the Court of Appeals for the Seventh Circuit is without precedent in the Supreme Court is a brazen misstatement of the law. The citations previously cited and cited in the Court of Appeals' opinion belie that statement.

In order to fully understand the petitioner's petition, which is a rather complicated one to understand, one must look at its motives for presenting the petition. The accident out of which this appeal arose occurred on December 16, 1951. The statute of limitations in the State of Illinois is two years. Therefore, the statute ran on December 16, 1953. We believe that petitioner's motives from the District Court on upward to this petition for Writ of Certiorari were merely to do precedurally what it thought it would be unable to do substantively, namely, deprive the injured person of her right to trial by jury against both defendants. Looking at the record (R. 124) in our suggestions in support of objections to a recall of the mandate, the petitioner's motives become obvious. The Circuit Court of Appeals denied petitioner's petition for re-

hearing on November 6, 1953. Rule 25 (a) of the Court of Appeals for the Seventh Circuit provides for the mandate to issue within five days thereafter. The mandate issued on November 13, 1953. The petitioner then moved for a recall of the mandate, which motion was mailed on November 16, 1953. Rule 25 (b) of the Court of Appeals for the Seventh Circuit grants a stay of 30 days, providing a certificate of filing in the Supreme Court of the United States is filed with the Court of Appeals, and that stays the mandate until final disposition. It is noted that there was a space of 10 calendar days between the denial of the petition for rehearing and the date of the mailing of the motion to recall the mandate. The reason is obvious. At that time, time was of the essence in this cause for the injured party.

The statute of limitations to refile this cause upon which the entire action and this appeal is predicated ran on December 16, 1953. If counsel for the petitioner had moved for a stay prior to November 16, 1953, they would have had to file in the Supreme Court within the 30-day period. This would have given the injured party sufficient time to refile her law suit. The motion for the recall of the mandate was allowed. On November 24, 1953, the United States Court of Appeals for the Seventh Circuit recalled the mandate and its order on page 126 of the Record stayed the mandate for a period of 30 days, pending "the filing of a petition for certiorari within the said 30 days." A petition for Writ of Certiorari in this Court was not filed with the Clerk of the Court until December 28, 1953, although the same was due on December 24. It is our sincere belief that this petition for Writ of Certiorari is nothing but a face-saving gesture on the part of the petitioner to conform to the order of the Court of Appeals.

The reasons given by the petitioner for the granting of the writ are facetious. The court's modification of its ruling in the *Bolton* case was not in the respondent's favor, but rather to the petitioner's.

Petitioner's statement at page 8 of its brief that the Court of Appeals had not deemed the District Court vested with an informed discretion when the District Court had expressly declared that it had such discretion is a misstatement of the facts. The Court of Appeals held that the District Court, as stated in the opinion, denied the motion upon an asserted legal premise which in fact does not exist. (R. 99) (Namely, that the petitioner-defendant below had an absolute right to a trial in the Federal Court upon a removed case and dismissal would not apply to such a case.)

Petitioner's other reason as set out at page 9 of its brief, that the opinion of the Court of Appeals for the Seventh Circuit is without precedent in the Supreme Court in permitting the plaintiff to take a non-suit in a removed case for the express purpose of suing the same defendant upon the same cause of action, is without factual basis. Petitioner obviously has ignored the citations in the opinion of Chief Judge Major of the Court of Appeals for the Seventh Circuit wherein the Honorable Justice has cited numerous cases (R. 98).

Petitioner's last reason as set out at page 9 of its brief that the Court of Appeals exercised original and not appellate jurisdiction falls by the wayside when it is noted in the opinion wherein the court states, "It is more apt to conclude and we do, that the court for the reason shown denied the motion upon an asserted legal premise which in fact does not exist." (R. 99) Surely, that is finding error.

It is respectfully submitted, therefore, that under no conceivable theory (and petitioner has conceived a number herein) does it set forth valid grounds pursuant to Rule 38(5)(b) of this Court, to invoke certiorari.

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for Writ of Certiorari in this cause should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 509

PARMALEE TRANSPORTATION COMPANY,
A Corporation,

Petitioner,

vs.

ZOE GRIVAS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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Mindful that it is not the office of a reply brief to re-canvass the merits of the case at large and that this Court's consideration of a reply brief on application for *certiorari* is a matter of this Court's grace, we confine this reply brief to a very short but, we think, incisive answer to respondent's brief.

I.

Respondent's brief does not effectively meet petitioner's demonstration that the right of a defendant to remain in the Federal courts after removal is not subject to frustration at the will of the plaintiff.

Respondent entirely misses the thrust of petitioner's application for writ of *certiorari* and therefore does not recognize the importance to the national jurisprudence of petitioner's contention.

Distilled to its essence, petitioner's contention is that to permit a plaintiff in a removed case to dismiss the suit for the purpose of repairing to a State court when he could not accomplish that result by amending his pleadings so as to reduce the *ad damnum* or to join parties with the result of ousting Federal jurisdiction is indirectly to vitiate the rights of a removing defendant which this Court has held to be tantamount to substantive rights.

St. Paul Indemnity Co. v. *Red Top Cab Co.*, 303 U. S. 283, is incisively in point. In that case the plaintiff's original suit was for the sum of $4,000, $3,000 being then as now the minimum amount requisite to confer Federal jurisdiction upon the ground of diversity of citizenship of the parties. An amended complaint, filed by leave of court, disclosed damages in a sum not to exceed $1380.89. The District Court decided the case upon the merits. The Court of Appeals held that, the amended complaint having set forth a cause of action for an amount which could not equal the statutory jurisdictional minimum, the cause should be remanded to the State court. This case was a *removed* case.

This Court reversed the Court of Appeals. In speaking through Mr. Justice Roberts, this Court said at page 293:

> "Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached."

The Court further said at page 294:

> "If the plaintiff could, no matter how *bona fide* his original claim in the state court, reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice. The claim, whether well or ill founded in fact, fixes the right of the defendant to remove, and the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his eleection. If he does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."

We submit that if there is to be a difference between a case where a plaintiff seeks to oust removal jurisdiction by reducing the *ad damnum* and a case in which he seeks to achieve that end by adding parties whose presence defeats Federal jurisdiction by voluntarily dismissing the case after it is at issue and ready for trial, such a ruling should be enunciated by this Court and not by the Court of Appeals.

II.

Brief reply to sundry other points in respondent's brief.

Respondent is in error in stating that the district court's judgment was not pronounced on the merits. The cause was at issue upon a complaint asserting and an answer denying liability. The cause was called for trial and the plaintiff, erroneously conceiving that jurisdiction to try the case had been ousted either by her abortive appeal from

the order denying the motion to dismiss or by her claim of an absolute right to dismiss even though that claim had been denied by the district court, refused to participate in the trial. The district court's judgment was rendered upon a verdict of not guilty.

This judgment was a valuable property right of petitioner and should, not, we submit, have been abridged when it appears that it rested upon the district court's exercise of the jurisdiction in which the Court of Appeals found that that court possessed.

Respondent also misconceives the import of the opinion of the Court of Appeals. That opinion declares, as we pointed out in our original brief, that the district court acted upon a premise of law which the Court of Appeals found to be false. But, as we further demonstrated, it also appears that the district court reached the conclusion, independent of any categorical principle of law, that it would be unjust in this particular case to permit dismissal without prejudice at the late date when such dismissal was sought by respondent.

This exercise of discretion on the part of the district court should not have been disturbed.

Conclusion.

For the reasons set forth in the original petition, as reinforced by the considerations developed in this reply brief, we respectfully submit that the judgment of the Court of Appeals should elicit *certiorari* and reversal.

Respectfully submitted,

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